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Case Notes

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CASE NOTES

ENTERTAINMENT LAW—AN INJUNCTION RESTRICTING AN ACTOR'S RIGHT OF PUBLICITY AND FIRST AMENDMENT RIGHTS IS AGAINST PUBLIC POLICY—*KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 164 Cal. Rptr. 571 (1980).

KGB, Inc., a San Diego radio station, first hired Ted Giannoulas in 1974 to make public appearances as the station's mascot, the "KGB Chicken".[1] The station sent Giannoulas to San Diego Padres' baseball games where he was so popular that he soon became a fixture in the stadium. His comic routine not only attracted more fans to the games, but also raised KGB's local media standings from fifth to first place.[2]

In 1979, at a Padres' game played away from San Diego, Giannoulas appeared in the KGB Chicken suit without wearing the chicken vest displaying the KGB call letters. The station sued him, alleging breach of employment contract, unfair competition, servicemark infringement, and several other causes of action. They sought damages and an injunction preventing Giannoulas from appearing in a chicken suit.[3] The trial court dismissed all counts except that for breach of contract. However, it granted KGB a preliminary injunction on the grounds that "likelihood of confusion" might occur in the public mind should Giannoulas appear as a chicken.[4]

The first paragraph of the preliminary injunction restricted Giannoulas from appearing anywhere in the KGB Chicken costume. Paragraph 1, section (c) also prevented him from appearing anywhere in a chicken costume which was

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1. The KGB Chicken is described in the preliminary injunction as "a chicken red in color, with brown face, yellow beak, yellow webbed feet, blue eyelids, blue vest with the letters 'KGB', and a red comb on the top of his head." KGB, Inc. v. Giannoulas, 104 Cal. App. 3d 844, 847 n.2, 164 Cal. Rptr. 571, 576 n.2 (1980).

2. Kopper, *Ted Giannoulas*, 1980 THE ENCYCLOPEDIA BRITANNICA BOOK OF THE YEAR 78, *reprinted in* 104 Cal. App. 3d at 858 n.4, 164 Cal. Rptr. at 584 n.4.

3. 104 Cal. App. 3d at 846-47, 164 Cal. Rptr. at 576.

4. *Id.*

substantially similar in design to the KGB Chicken suit. The last two paragraphs enjoined him from wearing any chicken ensemble or suit whatsoever in (a) San Diego County and adjacent counties, or (b) any sports or public event where a San Diego County team appeared.[5]

The California Court of Appeals[6] found that the preliminary injunction invalidly restricted Giannoulas' "vital right" to earn a living and to express himself as an artist. Such an injunction, noted the court, was against public policy. Accordingly, the court granted a writ of supersedeas staying the preliminary injunction except for those sections which specifically referred to the KGB Chicken suit.

Considering first the public policy argument against restraints of trade, the court observed that restraining injunctions have always been reluctantly issued by the courts.[7] Further, this public policy is reflected in California Business and Professions Code section 16600 which makes many injunctions in restraint of trade illegal.[8] Relying on several recent cases,[9] the court concluded that "[t]his statute presents an absolute bar to post-employment restraints and represents a strong public policy of this state."[10] Even if employee performance might be enjoined after breach of contract,[11] an injunction

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5. *Id.* at 847 & n.2, 164 Cal. Rptr. at 576 & n.2.

6. Pending appeal, the court first stayed the last two paragraphs of the preliminary injunction on January 23, 1980. KGB, Inc. v. Giannoulas, 101 Cal. App. 3d 323, 325, 161 Cal. Rptr. 583, 584-85 (1980). After hearing the merits of the appeal, the court also stayed subsection (c) of the first paragraph on April 21, 1980. 104 Cal. App. 3d at 847, 164 Cal. Rptr. at 576. The second opinion elaborates on the reasoning of the earlier opinion, and, indeed, incorporates substantial portions verbatim.

7. 104 Cal. App. 3d at 847, 164 Cal. Rptr. at 576-77 (citing Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Ohio Ct. C.P. 1952); 11 WILLISTON ON CONTRACTS §§ 1423, 1450 (3d ed. 1968); RESTATEMENT OF CONTRACTS § 380, comment g (1932)).

8. 104 Cal. App. 3d at 848, 164 Cal. Rptr. at 577. CAL. BUS. & PROF. CODE § 16600 (Deering 1976) states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The exceptions do not apply here, *see* CAL. BUS. & PROF. CODE §§ 16600-02 (Deering 1976).

9. Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965); Golden State Linen Serv., Inc. v. Vidalin, 69 Cal. App. 3d 1, 137 Cal. Rptr. 807 (1977); Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35, 100 Cal. Rptr. 791, *aff'd*, 414 U.S. 117 (1972).

10. 104 Cal. App. 3d at 848, 164 Cal. Rptr. at 577. *See* Briody, *Employment Agreements Not to Compete in California*, 47 CAL. ST. B. J. 318 (1972).

11. CAL. CIV. CODE § 3423 (Deering 1972) provides in part that an injunction cannot be issued

> [t]o prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another

should issue *only* for the term of the contract, *not beyond* the term.[12]

Even in states where injunctions in restraint of trade are not illegal, the court emphasized that in order for them to stand, the party seeking them must carry the heavy burden of showing that enforcement is reasonable.[13] The circumstance most relevant to reasonableness is "irreparable harm to the employer."[14] KGB claimed that the "likelihood of confusion" in the public mind which would result from Giannoulas' chicken appearances would irreparably harm the station. However, the court found that this claim was ridiculous in light of the free publicity which KGB had received "no doubt to its delight" from Giannoulas' nationally famous chicken appearances.[15] Further, KGB did not produce evidence of actual injury sufficient to plead a good cause of action. As the court stated, "where are the lost listeners? Likelihood of confusion is insufficient; the confusion must be hurtful to the employer

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> where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced.

A question has arisen as to whether the last clause of this section applies only to contracts other than unique service contracts, or whether it applies to all service contracts. While courts do not specifically enforce personal service contracts, they may interpret this clause to allow enforcement of covenants not to compete. *See* Briody, *supra* note 10, at 353-54; Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18 (1954); Youngman, *Negotiation of Personal Service Contracts*, 42 CALIF. L. REV. 2 (1954). *But see* CAL. CIV. PROC. CODE § 526 (Deering 1972), which sets off the unique service contract language in parentheses, implying that courts could specifically enforce these special contracts. California courts have specifically enforced these contracts, but only for the contract term. *See* note 12 *infra*.

12. 104 Cal. App. 3d at 849-50, 164 Cal. Rptr. at 578 (citing Loew's, Inc. v. Cole, 185 F.2d 641, 657 (9th Cir. 1950) (dictum); MCA Records, Inc. v. Newton-John, 90 Cal. App. 3d 18, 24, 153 Cal. Rptr. 153, 155 (1979); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 679, 80 Cal. Rptr. 240, 245 (1969)).

13. 104 Cal. App. 3d at 848, 164 Cal. Rptr. at 577. Restraints on trade that have been held valid in California include: those limiting competition by the seller of a business, Roberts v. Pfefer, 13 Cal. App. 3d 93, 91 Cal. Rptr. 308 (1970); those barring one party from pursuing a limited part of a business, Boughton v. Socony Mobil Oil Co., 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (1964); those forbidding use of former employer's customer lists or trade secrets, Gordon v. Landau, 49 Cal. 2d 690, 321 P.2d 456 (1958).

14. 104 Cal. App. 3d at 848, 164 Cal. Rptr. at 577 (referring to Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Ohio Ct. C.P. 1952)).

15. 104 Cal. App. 3d at 858 n.4, 859, 164 Cal. Rptr. at 583-84 n.4, 584.

before an injunction is justified."[16] In deciding that "likelihood of confusion" was insufficient to show irreparable harm, the *KGB* court followed *Arthur Murray Dance Studios, Inc. v. Witter*, where the court determined that the employer must prove his injury is actual, not probable.[17]

Based on the public policy that he who expends labor to create a valuable product should reap the benefits of its use,[18] the court also rejected KGB's unfair competition claim. According to the court, Giannoulas had not misappropriated KGB's labor because Giannoulas' contribution was of "inevitable significance" in developing the "fluid, changing, clownish role."[19] Further, the court found that Giannoulas had not deceived or misled the public, since he was not implying in his chicken routines that he represented KGB.[20] Giannoulas' performances met neither the misappropriation nor the deception element necessary for KGB to sustain a claim in unfair competition. The court also pointed out that an injunction restraining the pursuit of one's livelihood would be an inappro-

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16. *Id.* at 850, 164 Cal. Rptr. at 578.

17. First there must be injury, either actual or threatening. It must be real, not imaginary and not doubtful. There can be no irreparable injury without injury. There can be no adjective modifying a noun if there is no noun. Second, conceding that an irreparable injury is something difficult to measure, usually there must be something more than just fear of injury, and something more than trivial or inconsequential injury.

105 N.E.2d at 702.

The *Arthur Murray* court distinguished the situation where a negative covenant not to compete in a contract for selling a business is held violated on a presumption of injury, from the case where such a covenant in an employee contract will be held violated only with proof of injury. The *KGB* court quotes *Arthur Murray* extensively on how this distinction arises:

> The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants. . . . To him, the right to work and support his family is the most important right he possesses. . . . He is more likely than the seller to make a rash, improvident promise that, for the sake of present gain, may tend to impair his power to earn a living, impoverish him, render him a public charge or deprive the community of his skill and training. . . . A seller is usually paid an increased price for agreeing to a period of abstention. . . . Usually the employee gets no increased compensation.

Id. at 704, *quoted in* 104 Cal. App. 3d at 849, 164 Cal. Rptr. at 577-78.

18. *See* International News Serv. v. Associated Press, 248 U.S. 215, 221 (1918).

19. 104 Cal. App. 3d at 851, 164 Cal. Rptr. at 579 (citing 248 U.S. at 221). The court did not deny that KGB had some rights to the KGB Chicken, but it found that those rights were limited to the fixed design of the chicken suit. Accordingly, the court allowed those sections of the preliminary injunction which prevented Giannoulas from wearing the KGB Chicken outfit to stand.

20. 104 Cal. App. 3d at 850, 164 Cal. Rptr. at 578.

priate remedy in an unfair competition case.[21]

The court used a third public policy argument based on strict construction of contracts to deal with KGB's breach of contract claim.[22] These contracts referred specifically to the costume and concept of the KGB Chicken and generally to any ideas, characters, programs, themes, titles, and subject matter by Giannoulas during his employment.[23] A negative covenant not to compete also restrained Giannoulas from being a mascot for another radio station in the San Diego market for five years after employment with KGB.[24] After examining these contracts, the court strictly construed their language against the employer and decided that the contracts gave KGB exclusive rights only to the KGB Chicken, not a monopoly over all of Giannoulas' appearances in any chicken suit.[25]

The court also rejected KGB's contention that the station had rights to the KGB Chicken role merely because it had assisted in the development of the role. As the court observed, no precedent has been found which clearly defines "the respective rights in fictional characters of the artist who plays the role, the employer who finances and assists him, and members of the general public who choose to imitate aspects of the character."[26] The court proceeded to establish that Giannoulas had both rights of publicity and first amendment rights in the character which he had developed.[27]

To support its conclusion, the court focused on two cases: *Lugosi v. Universal Pictures*[28] and *Guglielmi v. Spelling-Goldberg Productions*.[29] The decision in *Lugosi* followed a

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21. *Id.* at 851, 164 Cal. Rptr. at 579.

22. The court noted that this claim should only be considered where a restraint of trade is not banned by statute. *Id.* at 852, 164 Cal. Rptr. at 579. Not all restraints may be banned in California. *See* notes 11-13 *supra*.

23. *Id.* at 852-53, 164 Cal. Rptr. at 580.

24. *Id.* at 852, 164 Cal. Rptr. at 580.

25. *Id.* at 853, 164 Cal. Rptr. at 580 (citing W.R. Grace & Co. v. Hargadine, 392 F.2d 9, 20 (6th Cir. 1968); RESTATEMENT OF CONTRACTS §§ 236(f), 515 (1932)).

26. 104 Cal. App. 3d at 853, 164 Cal. Rptr. at 580.

27. *Id.* at 854, 859-60, 164 Cal. Rptr. at 581, 585.

28. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). Lugosi had portrayed "Dracula" in a Universal Pictures film. His heirs sued Universal Pictures for its profits in licensing to commercial firms the use of the likeness of the character. The California Supreme Court held that the actor's right of publicity was personal and must be exercised by him during his lifetime, if at all. After his death, his name and likeness entered the public domain. *Id.* at 824, 603 P.2d at 430, 160 Cal. Rptr. at 328. *But see* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

29. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979). The nephew of the

modern trend in national court decisions that an actor has a right of publicity in the role he has created.[30] While the *KGB* court distinguished the issues in *Lugosi* as not determinative of KGB's rights,[31] they agreed that an actor has "rights to decide how and when to exploit his identity and to enjoy the fruits of his labor."[32]

More importantly the KGB court gave Giannoulas first amendment rights in the fictitious character he had developed. First amendment rights for entertainment have been discussed by some courts in recent years, but not in reference to an actor's rights in a role created for an employer.[33] Chief Justice Bird in her concurring opinion in *Guglielmi* explicitly stated that entertainment "is entitled to the same constitutional protection as the exposition of ideas."[34] The *KGB* court adopted the Chief Justice's distinction between "the commercial right to earn a living [and the] personal freedom of artistic expression."[35] According to the court, both of these are vital rights[36] and an

> employer has a weak case against his employee when he seeks to prevent future performances, unless he can point to a specific contract conferring such rights. His naked claim of having assisted the development of the role is not enough; presumably he has been compensated for the assistance by the revenues from performances while the employee still worked for him.[37]

In view of section 16600 and KGB's inadequate factual

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deceased actor Rudolph Valentino sued the television producers of a fictionalized version of the actor's life. As in *Lugosi*, the court held that the right of publicity was not descendible and expired upon death. *Id.* at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353.

30. 25 Cal. 3d at 824, 603 P.2d at 428, 160 Cal. Rptr. at 326. *See* note 60 *infra*.

31. The parties involved in *Lugosi* were not former employer and employee, but past employer and employee's heirs. The issue was the *inheritability* of the right of publicity.

32. 104 Cal. App. 3d at 854, 164 Cal. Rptr. at 581.

33. *See* note 62 *infra*.

34. 25 Cal. 3d at 867, 603 P.2d at 459, 160 Cal. Rptr. at 357 (concurring opinion) (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 535, 483 P.2d 34, 38, 93 Cal. Rptr. 866, 870 (1971); Weaver v. Jordan, 64 Cal. 2d 235, 242, 411 P.2d 289, 294, 49 Cal. Rptr. 537, 542 (1966); Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 229, 253 P.2d 441, 444 (1953)).

35. 104 Cal. App. 3d at 854, 164 Cal. Rptr. at 581. *See* 25 Cal. 3d at 869-74, 603 P.2d at 459-62, 160 Cal. Rptr. at 356-61 (concurring opinion).

36. 104 Cal. App. 3d at 847, 164 Cal. Rptr. at 576.

37. *Id.* at 853, 164 Cal. Rptr. at 580.

showing of irreparable harm and express contract, the court refused to enforce the preliminary injunction which prohibited Giannoulas from exercising his rights of publicity and artistic expression.[38]

The court recognized two limits to an artist's rights in the role he developed. First, the role must be exclusively associated with the actor; the actor's identity with that role must be impressed in the public mind.[39] The court rejected KGB's claim to exclusive identity with the comic chicken routine by examining the case of *West v. Lind*,[40] wherein Mae West lost her claim to exclusive association with a role she had played. The court found that KGB had a claim to exclusive association with the KGB Chicken only, and not with the remainder of Giannoulas' chicken roles.[41]

The second limit imposed by the court requires that the actor's style be a "unique individual likeness."[42] The court extended this concept beyond facial expressions to the general body language and behavior of masked or unmasked actors.[43] Whether a high consideration was paid to the actor was also considered as evidence of uniqueness.[44]

KGB also failed in its attempt to invoke Labor Code section 2860, which provides that everything acquired by an employee "by virtue of his employment" belongs to his employer.[45] This statute has previously been applied to protect an employer from employee misappropriation of trade secrets and confidential information.[46] The court refused to extend its use to protect an employer's rights in an actor's creations during employment when no express contract provided the em-

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38. *Id.* at 859-60, 164 Cal. Rptr. at 585.

39. *Id.* at 854-55, 164 Cal. Rptr. at 581.

40. 186 Cal. App. 2d 563, 9 Cal. Rptr. 288 (1960). Mae West was unable to enjoin defendant's appearance as "Diamond Lil," a role West claimed to have developed, because the role was not exclusively associated with West in the public mind.

41. 104 Cal. App. 3d at 855, 164 Cal. Rptr. at 581.

42. *Id.*, 164 Cal. Rptr. at 581-82. *See* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970); Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962); 42 CALIF. L. REV., *supra* note 12, at 21.

43. 104 Cal. App. 3d at 855, 164 Cal. Rptr. at 581-82.

44. *Id.*, 164 Cal. Rptr. at 582.

45. CAL. LAB. CODE § 2860 (Deering 1973) states: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

46. 104 Cal. App. 3d at 855, 164 Cal. Rptr. at 582. *See, e.g.*, California Intelligence Bureau v. Cunningham, 83 Cal. App. 2d 197, 188 P.2d 303 (1948); Riess v. Sanford, 47 Cal. App. 2d 244, 117 P.2d 694 (1941).

ployer with such rights.[47]

KGB asserted two other claims that were dismissed by the court. KGB argued that by continuing to perform, Giannoulas was infringing on their registered servicemark, the KGB Chicken. The court concluded that chicken costumes in general could not be subject to monopoly, since the strong public policy in trademark and servicemark law is "to prevent monopoly of generic names or of functional or utilitarian aspects of products."[48] Further, the court found that a person wearing a chicken costume could not be a servicemark because a servicemark must be stationary and unchanging; the servicemark must identify the source of a service, not the service itself.[49] The concept of a person performing in a chicken costume appeared to the court to be in the public domain.[50] KGB could not remove by claim of monopoly that which had entered the public domain.[51]

Finally, KGB claimed that the court was without jurisdiction to contradict the trial court's factual findings. The court agreed with this contention, and accepted the trial court's finding that a costumed chicken at a public event had a secondary meaning in the public mind. Nonetheless this was "insufficient to show irreparable harm, or indeed any harm, and it does not warrant a preliminary injunction restricting constitutionally protected freedoms and possibly violating a statute as well."[52] Furthermore, the court found the injunction was invalid because it was not based on a valid complaint,[53] it did not preserve the status quo,[54] and it was so vague, uncertain, and broad that, if supported, it would be difficult to enforce and

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47. 104 Cal. App. 3d at 855, 164 Cal. Rptr. at 582.

48. *Id.* at 856, 164 Cal. Rptr. at 582 (citing Application of Deister Concentrator Co., 289 F.2d 496, 504 (1961)).

49. 104 Cal. App. 3d at 857, 164 Cal. Rptr. at 583.

50. *Id.*

51. *See, e.g.*, Cebu Ass'n v. Santo Nino de Cebu, Inc., 95 Cal. App. 3d 129, 136-37 (1979); Polish Nat'l Catholic Church of the Holy Mother of the Rosary v. Diocese of Buffalo, 171 N.Y.S. 401 (1918).

52. 104 Cal. App. 3d at 858, 164 Cal. Rptr. at 583.

53. The servicemark and unfair competition charges had been dismissed before the injunction issued. *Id.* at 859, 164 Cal. Rptr. at 584 (citing Moreno Mut. Irrigation Co. v. Beaumont Irrigation Dist., 94 Cal. App. 2d 766, 778, 211 P.2d 928, 935 (1949); Watson v. Santa Carmelita Mut. Water Co., 58 Cal. App. 2d 709, 719, 137 P.2d 757, 762 (1943)).

54. Giannoulas no longer worked for KGB and the status quo was never that Giannoulas could not wear any chicken suit. 104 Cal. App. at 859, 164 Cal. Rptr. at 585. *See* Continental Baking Co. v. Katz, 68 Cal. 2d 512, 528, 439 P.2d 889, 899, 67 Cal. Rptr. 761, 771 (1968).

might invite continual litigation.[55]

The significance of *KGB, Inc. v. Giannoulas* is best understood through an examination of prior case law. Courts in the United States have always struggled in dealing with encroachments on artistic expression, especially when transient human performances are involved.[56] An actor, such as Charlie Chaplin, who portrays a character which he originally created, may have protected rights in that character.[57] If rights in a character are expressly contracted for and restraints of trade are not banned by statute, courts will enforce such covenants.[58] But the actor has often been denied the rights to a character which he performed with the aid of an employer and without an express contract guarantee. Both the right of privacy and unfair competition have proved inadequate bases to support the actor's claim to his character.[59] The modern concept of the right to exploit one's own identity for commercial benefit, which has been called the right of publicity, was fashioned to treat the actor's rights more fairly.[60]

Recently, a trend has developed in national court decisions to consider an actor's performance as artistic expression. This allows the actor to claim first amendment rights to perform; mere entertainment is unprotected.[61] Of the cases which

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55. 104 Cal. App. at 859, 164 Cal. Rptr. at 585 (citing Pitchess v. Super. Ct., 2 Cal. App. 3d 644, 651, 83 Cal. Rptr. 41, 44 (1969); People v. Gordon, 105 Cal. App. 2d 711, 725, 234 P.2d 287, 296 (1951)).

56. Gaskin, *The First Amendment: Blanket Protection for Performance Arts?* 15 PUBLISHING ENTERTAINMENT ADVERTISING & ALLIED FIELDS L.Q. 411 (1976).

57. Chaplin v. Amador, 93 Cal. App. 358, 269 P. 544 (1928). Charlie Chaplin sued to enjoin the defendant from imitating the character "Charlie Chaplin" without authorization. An injunction was granted on the grounds that Chaplin had originated and played the character himself. *Id.* at 362-63, 269 P. at 545-46.

58. *See, e.g.*, Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952); Lillie v. Warner Bros. Pictures, 139 Cal. App. 724, 34 P.2d 835 (1934); Kirby, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 17 PUBLISHING ENTERTAINMENT ADVERTISING & ALLIED L.Q. 159, 170 (1978).

59. *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (right of privacy inadequate to prevent use of football player's photograph in calendar); Paramount Pictures, Inc. v. Leader Press, 106 F.2d 229 (10th Cir. 1939) (unfair competition did not protect plaintiff where defendant did not pass off items as his own). *See* Nimmer, *Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

60. *E.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3rd Cir. 1956); Haelan Laboratories v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

61. "It is highly questionable whether performance arts could be excluded from first amendment protection simply because of their dual function of expression and entertainment. But the suppression of performance arts is rooted in such a dichot-

have discussed first amendment protection for entertainers, none confer these rights on the actor who creates a role under his employer.[62] The *KGB* court found that an actor enjoyed a right of publicity and a first amendment right in his unique role. The injunction, however, was modified based on the public policies against suppressing freedom of expression, pirating another's labor, and restraining trade, thereby skirting the issue of whether performance is specifically protected under the first amendment.

Thus, two major questions were left unanswered by the court's opinion. The first involves distinguishing between protected artistic expressions and unprotected entertainment. The second question concerns the relationship between contract rights and the rights to earn a living and to artistic expression.

The vague guidelines set by the court to determine what constitutes artistic expression create the first problem. The court does not consider what distinguishes an artistic performance from entertainment. Can it be assumed that all performances are artistic, and therefore are protectable under the first amendment?[63] The extent to which the actor must develop a role before he can be said to contribute significantly to it also remains uncertain and the concepts of "unique individual likeness" and public identification need more clarification.

The second question, concerning the competing interests of contract rights and the right to earn a living and to artistic expression, stems from the reluctance of the court to decide whether the covenant in restraint of trade under consideration in *KGB* would be illegal in California. Although the court suggested at the start of the opinion that it would discuss this

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omy." Gaskin, *supra* note 56, at 411.

62. The Court extended first amendment rights to motion pictures in 1952. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). An initiative adopted by the electorate to ban home subscription television was declared unconstitutional because first amendment rights protected this means of dissemination for both entertainment and the exposition of ideas. Weaver v. Jordan, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966). Theatrical street performances in protest of the draft were placed under first amendment protection in Schacht v. United States, 398 U.S. 58 (1970). These rights were not a defense to copying the fictional characters of another. Sid & Marty Kroft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972). A television station did not have first amendment rights to show plaintiff's complete act on their news program. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

63. *See* Gaskin, *supra* note 56, at 412.

issue, it failed to do so.[64] Instead, the court stated that such covenants would *possibly* be invalid, but did not decide what this possibility would be.[65] However, if covenants not to compete were enforced by injunction,[66] the court could find that the actor's first amendment rights and his right to earn a living preempt the employer's contract rights in California.

Karla C. Downs

64. "We deal with a conflict between an employer's asserted contract rights and the fundamental rights of an employee to earn a living, even in possible violation of the employer's bargain with him." 104 Cal. App. 2d at 846, 164 Cal. Rptr. at 576.

65. *Id.* at 848, 164 Cal. Rptr. at 577. The court probably left this issue to be decided on the merits of the breach of contract case because of the factual determinations involved and the uncertain interpretation of section 3423, *supra* note 11.

66. Such a determination might be made under section 3423, *supra* note 11.

EXCLUSIONARY RULE—FEDERAL COURT SUPERVISORY POWER CANNOT BE USED TO SUPPRESS EVIDENCE ILLEGALLY SEIZED FROM THIRD PARTY—*United States v. Payner*, 447 U.S. 727 (1980).

The use of the exclusionary rule outside of the fifth amendment area[1] was expanded in a long line of Supreme Court decisions to the benefit of the criminal defendant. In *Weeks v. United States*[2] the Court required federal courts to exclude evidence seized in violation of a defendant's fourth amendment right to be free from unreasonable searches and seizures. The scope of the rule was further expanded to include evidence obtained in violation of the constitutional guarantees of due process[3] and the assistance of counsel.[4] In *McNabb v. Mallory*,[5] the federal exclusionary rule was invoked on still other grounds—as an exercise of the Court's "supervisory authority over the administration of criminal justice in the federal courts".[6] Finally, the Warren Court extended the *Weeks* rationale and imposed the fourth amendment exclusionary rule on state courts in *Mapp v. Ohio*[7] by overruling *Wolf v. Colorado*.[8]

Since the accession of the Burger Court, however, there has been a gradual contraction of the potential scope of the rule which had enabled the government's collateral use of illegally obtained evidence in civil,[9] grand jury,[10] and *habeas corpus*[11] proceedings. On a par with these apparent limitations of the *Mapp* decision must be placed the Burger Court's decision in *Rakas v. Illinois*,[12] which firmly established the

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1. Miranda v. Arizona, 384 U.S. 436, 444 (1966); Boyd v. United States, 116 U.S. 616, 634-35 (1886).

2. 232 U.S. 383 (1914).

3. Rochin v. California, 342 U.S. 165 (1962).

4. United States v. Wade, 338 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964).

5. 318 U.S. 332 (1943).

6. *Id.* at 341.

7. 367 U.S. 643 (1961).

8. 338 U.S. 25 (1949).

9. United States v. Janis, 428 U.S. 433 (1975).

10. United States v. Calandra, 414 U.S. 338 (1974).

11. Stone v. Powell, 428 U.S. 465 (1976).

12. 439 U.S. 128 (1978).

rule that a defendant vicariously asserting the fourth amendment rights of a third party does not have "standing"[13] to avail himself of the protections of the fourth amendment exclusionary rule. In a decision characteristic of the Burger Court's disenchantment with the rule, the Supreme Court, in *United States v. Payner*,[14] left ajar another courtroom door for the admission of evidence obtained by official lawlessness by imposing the same standing requirements onto the exercise of the supervisory powers of federal courts. The majority concluded that a federal court's supervisory powers do not authorize it to suppress evidence illegally obtained from third parties not before the court.

In 1965, the Internal Revenue Service initiated an investigation into the financial affairs of American citizens in the Bahamas. The project, "Operation Trade Winds," was headquartered in Jacksonville, Florida and supervised by special agent Richard Jaffe.

In 1972, after learning that an alleged narcotics trafficker had an account at the Castle Bank and Trust Company of the Bahamas, agent Jaffe asked private investigator Norman Casper to further investigate Castle Bank and its depositors. As part of his plan to obtain the requested information, Casper arranged with Jaffe's approval, a date between a female employee, Sybol Kennedy, and Michael Wolstencroft, who was Vice-President and Trust Officer of Castle Bank. While the couple was on the date, Casper seized Wolstencroft's briefcase from Kennedy's apartment and brought it to a prearranged residence where the four hundred documents inside the briefcase were photographed by Jaffe, Casper, and an IRS photography expert. Casper replaced the briefcase when a lookout informed him the couple was returning to the apartment.

Ultimately, the documents photographed by the IRS uncovered a loan guarantee agreement in which Payner pledged the funds in his Castle Bank account as security for a $100,000 loan. An IRS investigation of Payner's 1972 federal income tax return led to his indictment on a charge of falsifying his 1972 federal income tax return in violation of 18

13. Justice Rehnquist phrases the issue in terms of whether the defendant harbored a legitimate expectation of privacy as opposed to whether the defendant has standing to claim the benefits of the exclusionary rule. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

14. 447 U.S. 727 (1980).

U.S.C. section 1001.[15]

In federal district court, Payner sought to have the documents found in Wolstencroft's briefcase excluded from evidence since they were obtained through an illegal and unconstitutional seizure of Wolstencroft's briefcase. Contending that the documents were admissible, the Government relied on three arguments. First, the Government contended that Payner had no standing under the fourth amendment to allege that the seizure of the briefcase was unconstitutional. Secondly, the Government maintained that the seizure was not so outrageous as to require exclusion under the due process guarantee of the fifth amendment. Finally, the Government argued that the court should not invoke its supervisory power over federal criminal prosecutions to exclude the evidence.

The district court agreed with the Government's first contention[16] but ruled that the incriminating evidence should be excluded because the Government's seizure was purposefully conducted in contravention of the Constitution and Florida law and was so outrageous as to infringe on Payner's due process rights. The district court also concluded that the factual circumstances of the case warranted the invocation of its supervisory power over federal prosecutions to exclude the damaging evidence.

On appeal, the Sixth Circuit Court of Appeals, in a per curiam opinion affirmed the district court's suppression of the evidence as a proper exercise of the district court's supervisory powers. As a result, the court of appeals did not reach the due process question.

The United States Supreme Court granted the Government's petition for certiorari and reversed the district court's decision in an opinion written by Justice Powell. While the opinion addressed the fourth amendment, fifth amendment, and supervisory power theories, any of which could justify the exclusion of relevant evidence, the thrust of the opinion focused on the supervisory power theory.

The Court dealt with the fourth amendment issue briefly

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15. In pertinent part § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, . . . a material fact or makes any false, fictitious or fraudulent statements . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001 (1976).

16. United States v. Payner, 434 F. Supp. 113, 126 (N.D. Ohio 1977).

by reiterating its position in *Rakas* that fourth amendment rights are personal rights which may not be vicariously asserted.[17] Thus, the Court agreed with the reasoning of the district court and the court of appeals, that since Payner did not possess a privacy interest in the documents seized from Wolstencroft's briefcase, he lacked standing under the fourth amendment to suppress the documents.[18]

In introducing its discussion of the supervisory power issue, the Court articulated its reticence in applying the exclusionary rule. While the Court first made it clear that courts should not condone unlawful evidence gathering schemes, it pointed out that illegally obtained evidence should not be excluded in every case.[19] A court's desire to deter or denounce such schemes must be balanced against the "considerable harm" which results from the suppression of relevant evidence—the impairment of a court's ability to ascertain the truth.[20] According to the Court, prior cases have "consistently recognized that unbending application of the exclusionary sanctions to enforce ideals of governmental rectitude would impede *unacceptably* the truth-finding functions of judge and jury."[21]

The Court acknowledged the use of supervisory powers in prior decisions to "exclude evidence taken from the *defendant* by 'willful disobedience of law,' " but noted that these authorities were not controlling where the illegally obtained evidence was seized from third parties.[22] Rather, the Court was guided by other decisions which indicated that a federal court's supervisory power is "applied with some caution even when the defendant asserts a violation of his own rights."[23] Given this distinction between evidence obtained from third parties not before the court and evidence obtained from a defendant, the majority then proceeded to "engraft the standing limitations of the Fourth Amendment onto the exercise of supervisory powers."[24]

In the majority's view, the analysis involved the same

17. 447 U.S. 727, 731.
18. *Id.*
19. *Id.* at 734.
20. *Id.*
21. *Id.* (emphasis added).
22. *Id.* 735 n.7 (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).
23. *Id.* at 734-35 (citing United States v. Caceres, 440 U.S. 741, 754-57 (1979); Elkins v. United States, 364 U.S. 206, 216 (1960)).
24. *Id.* at 748 (dissenting opinion).

question as to whether the exclusion was examined under the supervisory power or the fourth amendment.[25] Under either theory the same "competing interests" are brought into play: society's interest in "presenting probative evidence to the trier of fact"[26] and the court's interest in "deterring illegalities and protecting judicial integrity."[27] Within this framework, the Court found the societal interest controlling. The Court concluded that a federal court may not use its supervisory power to suppress evidence illegally obtained from third parties not before the court. The rationale for that conclusion was that prior "Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices."[28]

In a terse dissent, Justice Marshall criticized the holding for effectively allowing the government to turn the standing requirements of the fourth amendment "into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person."[29] The dissent criticized the majority's failure to address "several key findings" made by the district court, which apparently demonstrated that the dual purposes of the exclusionary rule would have been advanced by its application in the instant case. One particularly disturbing district court finding was that the government agents " 'plotted, schemed, and ultimately acted in contravention of the United States Constitution and the laws of Florida, knowing that their conduct was illegal' "[30] thus demonstrating their " '*bad faith hostility* toward the strictures imposed on their activities by the Constitution.' "[31] The dissent was even more troubled, however, by the district court's finding that the Government " 'affirmatively counsels' " its agents that the fourth amendment standing requirements allow them to illegally seize evidence from one individual so that it may be used against third parties who are the " 'real targets' " of the gov-

25. *Id.* at 736.
26. *Id.* at 736 n.8.
27. *Id.*
28. *Id.* at 735.
29. *Id.* at 738.
30. *Id.* at 742 (quoting United States v. Payner, 434 F. Supp. 113, 130 (N.D. Ohio 1977) (footnote omitted)).
31. *Id.* (quoting United States v. Payner, 434 F. Supp. 113, 130 (N.D. Ohio 1977) (footnote omitted) (emphasis in original)).

ernmental investigation.[32] Justice Marshall acridly pointed out that the majority did not deal with or disturb these findings.

Additionally, the dissent emphasized that supervisory powers have been used in the past to protect the integrity of the federal courts by "prevent[ing] the federal courts from becoming accomplices to [governmental] misconduct."[33] In closing, the dissent argued that the Court's decision rendered the supervisory powers "superfluous" since to successfully exclude evidence on the basis of supervisory powers, criminal defendants must also establish a violation of their fourth or fifth amendment rights.[34]

The Court's seeming indifference to the outrageousness of the Government's conduct was perhaps best demonstrated by the summary manner in which it treated the fifth amendment argument; the majority addressed the issue in a footnote.[35] After noting that the court of appeals "expressly declined to consider the Due Process Clause,"[36] the Court added that even if the illegal seizure was so outrageous as to contravene Payner's due process rights, he would not be able to avail himself of any due process protection unless the " 'government activity in question violated some protected right of the *defendant*.' "[37]

In addition to carefully presenting the facts, the majority was cautiously focused on the deterrence rationale[38] which is perhaps the most impotent of all justifications advanced for the invocation of the exclusionary rule.[39] In view of the fact that recent studies indicate that the exclusionary rule fails as a device to deter illegal searches and seizures by the police,[40] the majority's conclusion that "deterring such conduct is out-

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32. *Id.* at 743 (quoting United States v. Payner, 434 F. Supp. 113, 131-33 (N.D. Ohio 1977) (footnotes omitted)).

33. *Id.* at 744.

34. *Id.* at 748.

35. *Id.* at 737 n.9.

36. *Id.*

37. *Id.* (quoting Hampton v. United States, 425 U.S. 484, 490 (1975) (plurality opinion) (emphasis in original)).

38. *Id.* at 737.

39. Traditionally, there were three rationales offered for the exclusionary rule: 1) protection of privacy interests, 2) protection of the integrity of the federal courts, and 3) deterrence of illegal conduct by government officials. McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U.L.J. 1, 7 (1979).

40. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. OF CHI. L. REV. 665, 755-56 (1970).

weighed by the societal interest in presenting probative evidence"[41] seemed inevitable.

By focusing on the deterrence rather than the integrity rationale, the court directly avoided the supervisory power issue. As the dissent noted, supervisory powers were exercised in the past for the expressed purpose of preserving judicial integrity.[42] Instead of adequately addressing this argument,[43] however, the majority responded by imposing fourth amendment standing requirements onto the exercise of the supervisory powers. Now, in order for evidence to be suppressed under the exercise of the federal court's supervisory powers, the defendant's *own* fourth amendment privacy rights must be violated—if they are not, the evidence will come in regardless of the criminality of the underlying conduct.

United States v. Payner clearly confirms an existing trend by the Burger Court to limit the effect of the exclusionary rule. While holding that a third party's own privacy rights must be violated before he or she may invoke the supervisory powers to exclude illegally obtained evidence is unambiguous, the Court leaves important questions unanswered. What a third party defendant must now assert in order to get relief when his or her own privacy rights have been violated is unclear. In spite of its claim to the contrary, it is also questionable whether the Court means to condone illegal seizures so long as the evidence will be used against a third party who was not the direct victim of the seizure. Finally, the Court equivocates on the question of whether a third party defendant must satisfy fourth amendment standing requirements in order to suppress illegally obtained evidence under the fifth amendment.

Though Chief Justice Burger has urged that the exclu-

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41. 447 U.S. at 736 n.8.

42. *Id.* at 744.

43. In a footnote, the majority responded to the dissent's argument that an exercise of supervisory powers deals primarily with the need to protect the integrity of the federal courts. While the majority acknowledged that the protection of judicial integrity was one of the "two-fold" purposes of supervisory powers, it dispensed with the supportive cases cited by the dissent by concentrating on the fact that the defendants in those cases were "themselves the victims of the challenged practice". *Id.* at 736 n.8. In the majority's view, the crucial factor in those cases which warranted the exclusion of evidence was that the defendants satisfied the fourth amendment standing requirements. The majority did not interpret the dissent's cited cases to stand for the proposition that evidence obtained through governmental misconduct should be excluded regardless of the defendant's standing in order to preserve judicial integrity. *Id.*

sionary rule should be abolished altogether, except in a minority of cases,[44] *Payner* indicates that the Burger Court is not yet ready to abolish the exclusionary rule. However, the Court remains content to tortuously avoid the rule's sanction.

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44. Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

DOMESTIC RELATIONS—STEPPARENT IS LIABLE FOR SUPPORT OF SPOUSE'S CHILDREN FROM PRIOR MARRIAGE BUT TAX RETURNS ARE NOT DISCOVERABLE IN DETERMINING EXTENT OF LIABILITY—*In Re Marriage of Brown*, 99 Cal. App. 3d 702, 160 Cal. Rptr. 524 (1979)

The order dissolving the marriage of Gary and Roberta Brown granted custody of their three children to Gary. After her remarriage, Roberta filed a petition to regain legal custody of the three children. Gary resisted Roberta's petition and further sought an order to compel her to pay child support. He obtained a subpoena and subpoena duces tecum ordering the deposition of Roberta's present husband Paul, and the production of certain income tax returns filed during the marriage of Roberta and Paul. Asserting a spousal privilege, Paul refused to testify or to produce the tax returns. Gary sought to have sanctions imposed upon the ground that Civil Code section 250[1] prevented the marital privilege claim in child support proceedings. Paul responded with a motion to quash the subpoenas. The Superior Court of Sacramento County granted Paul's motion to quash.[2]

The court of appeal affirmed the trial court's decision, holding that all property of the former wife, including her community property interest in the income of her new husband pursuant to California Civil Code section 5127.5,[3] can be looked to in discharge of her statutory child support obligation. The court reached this result despite California Civil Code section 199 which provides that in the event of a dissolution of marriage "the obligation of a father and mother to support their natural child . . . shall extend only to, and may

1. Section 250 provides: "Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable under this title. Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage." CAL. CIV. CODE § 250 (West Supp. 1980).

2. *In re* Marriage of Brown, 99 Cal. App. 3d 702, 704-705, 160 Cal. Rptr. 524, 525 (1979).

3. CAL. CIV. CODE § 5127.5 (West Supp. 1980) provides that the wife has management and control of her interest in community property to the extent necessary to support her children. This includes her community property interest in the earnings of her new husband. The Code also provides that the natural father is not thereby relieved of any legal obligation to support his children.

be satisfied only from, the earnings and separate property of each . . . . "[4]

The court in *Brown* reasoned that section 199 is confined by its own terms to "child support proceedings brought under this chapter,"[5] and further noted that the stated chapter is not the only legislation imposing an obligation of child support.[6] To bolster its position, the court pointed to the legislative history of the two sections. The Senate Bill from which section 199 emerged[7] originally included a repeal of section 5127.5 but the repealing language was stricken, "thus negating any legislative intent to repeal section 5127.5 and any conclusion by the Legislature that the two statutes were conflicting."[8]

The court further held that Paul was properly allowed to assert a statutory spousal privilege against disclosure of both federal and state tax returns and Roberta's former husband was not entitled to depose Paul regarding those returns.[9] The court concluded that the privilege protecting information contained in income tax returns[10] bars the discovery of tax

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4. CAL. CIV. CODE § 199 (West Supp. 1980).

5. CAL. CIV. CODE § 199 states in pertinent part: "The obligation of a father and mother to support their natural child *under this chapter* . . . shall extend only to, and may be satisfied only from, the earnings and separate property of each, if there has been a dissolution of their marriage . . . . " (Emphasis added.)

6. *See, e.g.*, CAL. CIV. CODE § 4700 (West Supp. 1980) which provides that a court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child.

7. Section 199 emerged from Cal. Sen. Bill No. 569 (1973-74 Reg. Sess.) § 23; Cal. Sen. Amend. to Cal. Sen. Bill No. 569 (1973-74 Reg. Sess.) May 23, 1973, § 21; Cal. Sen. Amend. to Sen. Bill No. 569 (1973-74 Reg. Sess.) June 11, 1973, § 21.

8. 99 Cal. App. 3d at 707, 160 Cal. Rptr. at 526.

9. The *Brown* court did not rest its holding solely on the spousal privilege of Civil Code section 250. The court indicated that:

> although we are of the view that Civil Code Section 250 does not grant Gary the right to depose Paul as a witness in the proceeding against Roberta, the issue requires no extended discussion. The record shows that the purpose of the deposition was to question Paul in obvious conjunction with the production of his income tax returns. What we have said in the disposition of that issue is equally applicable here, if it does not in fact moot the issue concerning his privilege not to testify or to be called as a witness against his wife.

99 Cal. App. 3d at 710, 160 Cal. Rptr. at 527-528.

10. The judicially created privilege against the discovery of income tax returns from a construction of Cal. Rev. & Tax. Code § 19282 (West Supp. 1980), which makes it a misdemeanor for the Franchise Tax Board or any other officer or employee of the state, including its political subdivisions, to disclose or make known in any manner information as to the amount of income or any particulars set forth or disclosed therein. Sav-On Drugs, Inc. v. Superior Court, 15 Cal. 3d 1, 123 Cal. Rptr. 283

records in this instance and that the exception to this rule, recognized in the context of the enforcement of child support obligations,[11] is inapplicable.

The court's decision attempts to define the extent of a stepparent's duty to support the children of his or her spouse by a former marriage while limiting the availability of discovery for this purpose. Under careful scrutiny, however, the court's holding is not decisive since it is vulnerable to future attack as a result of its reliance on Civil Code Section 5127.5. Furthermore, the court's definition of a stepparent's privilege in income tax records affords ample opportunity for future manipulation in subsequent proceedings.

It is well established that parents have a legal duty to support their minor children.[12] The obligation imposed by various statutes[13] constitutes a codification of the duty which existed at common law.[14] The general rule in California specifies that "[i]n any proceeding where there is at issue the support of a minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child."[15] There is a strong legislative interest in assuring that minor children receive adequate support[16] and this policy is consistently reflected in case law.[17] Nevertheless, when the parents of a child separate, and

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(1975); Webb v. Standard Oil, 49 Cal. 2d 509, 319 P.2d 621 (1957).

11. The exception to the rule regarding the privileged nature of income tax returns is a result of the decision in Miller v. Superior Court, 71 Cal. App. 3d 145, 139 Cal. Rptr. 521 (1977), which held that the privilege does not apply in the context of enforcement of child support orders made pursuant to the Family Law Act.

12. Trial courts have the power to require either the father or mother or both to assist in the support of minor children. Moore v. Moore, 274 Cal. App. 2d 698, 79 Cal. Rptr. 293 (1969); Nunes v. Nunes, 62 Cal. 2d 33, 41 Cal. Rptr. 5 (1964); *see also* Lyons v. Municipal Court, 75 Cal. App. 3d 829, 844, 142 Cal. Rptr. 449, 456 (1977), where the trial court imposed criminal penalties for willful failure of parents to support their minor children.

13. CAL. CIV. CODE § 196 (West Supp. 1979); CAL. CIV. CODE § 206 (West Supp. 1979); CAL. CIV. CODE § 242 (West Supp. 1979); CAL. CIV. CODE § 4700 (West Supp. 1980); CAL. CIV. CODE § 4811 (West Supp. 1980)(duty of support and maintenance of minor children).

14. *In Re* Ricky H., 2 Cal. 3d 513, 520, 86 Cal. Rptr. 76, 79 (1970).

15. CAL. CIV. CODE § 4700 (West Supp. 1980).

16. CAL. CIV. CODE § 4701(f)(West Supp. 1980), provides that "[N]othing in this section shall limit the authority of the district attorney to utilize any and all civil and criminal remedies to enforce child support obligations regardless of whether or not the custodial parent receives welfare moneys." *See also*, CAL. PENAL CODE § 270 (West Supp. 1980), which imposes an obligation of support on both parents.

17. There is a statutory obligation of child support imposed on parents which continues notwithstanding the parent's lack of custody. The extent of the parental

one or both of the former spouses remarry, the law has been neither clear nor consistent in delegating the responsibility for child support.[18]

Under prior statutory and case law it was lawful for a stepparent to refuse any financial responsibility for his or her stepchild.[19] Trial courts were nevertheless given broad discretion to determine responsibility in each case,[20] guided only by the "urgency of the needs of the child and relative hardship to each parent in contributing to such needs."[21] This flexible standard resulted in a number of cases explicitly recognizing that, while a divorced mother's remarriage is not in itself a sufficient ground for redefining child support obligations, it is a factor which may be considered.[22]

With the enactment of Civil Code section 5127.5 in 1971, a new statutory duty was imposed on the formerly unaccountable stepparent. This statute provides that the wife's interest in the community property of her new marriage, including the

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support is left to the sound discretion of the court. Lyons v. Municipal Court, 75 Cal. App. 3d 829, 142 Cal. Rptr. 449; Moore v. Moore, 274 Cal. App. 2d 698, 79 Cal. Rptr. 293; Nunes v. Nunes, 62 Cal. 2d at 39, 41 Cal. Rptr. at 9. *See also In re* Marriage of Muldrow, 61 Cal. App. 3d 327, 132 Cal. Rptr. 48 (1976).

18. *See* Burns v. Burns, 190 Cal. App. 2d 714, 12 Cal. Rptr. 68 (1961) which noted the conflict among California cases regarding the effect of a wife's remarriage on the father's duty to support his children, some cases indicating that remarriage may be considered and others holding that it has no effect. *Burns* held that the wife's remarriage did not necessarily require modification of an allowance for child support. Evans v. Evans, 185 Cal. App. 2d 566, 8 Cal. Rptr. 412 (1960), held that the remarriage of a divorced wife had no effect upon the continuing duty of the father to provide for the support and maintenance of their children. *But see* Mattos v. Correia, 274 Cal. App. 2d 413, 79 Cal. Rptr. 229 (1969) and Cagwin v. Cagwin, 112 Cal. App. 2d 14, 245 P.2d 379 (1952) which considered the mother's remarriage when determining the father's duty to support their children.

19. "Generally speaking, the second husband is not bound in the absence of special extraordinary circumstances to maintain his wife's children by a former husband from whom she has been divorced." Chapin v. Superior Court, 239 Cal. App. 2d 851, 857, 49 Cal. Rptr. 199, 203 (1966). CAL. CIV. CODE § 209 (West Supp. 1979)(repealed 1979 Cal. Stats. Ch. 1170) provided that an individual was not bound to maintain a spouse's children by a former relationship.

20. *See* Moore v. Moore, 274 Cal. App. 2d at 702, 79 Cal. Rptr. at 295; Levy v. Levy, 245 Cal. App. 2d 341, 359, 53 Cal. Rptr. 790, 802 (1966); Woolams v. Woolams, 115 Cal. App. 2d 1, 6, 251 P.2d 392, 395 (1952).

21. Levy v. Levy, 245 Cal. App. 2d at 359, 53 Cal. Rptr. at 802; Moore v. Moore, 274 Cal. App. 2d at 702, 79 Cal. Rptr. at 295; Mattos v. Correia, 274 Cal. App. 2d at 421, 79 Cal. Rptr. at 235.

22. Burns v. Burns, 190 Cal. App. 2d 714, 12 Cal. Rptr. 68. *See also, e.g.*, Evans v. Evans, 185 Cal. App. 2d 566, 8 Cal. Rptr. 412 (remarriage of divorced wife has no effect upon the continuing duty of the husband to provide support); Cagwin v. Cagwin, 112 Cal. App. 2d 14, 245 P.2d 379 (mother's remarriage may be considered when determining father's obligation to support children).

earnings of her new husband, is liable for the support of her children. The earlier "No Duty" statute, California Civil Code section 209,[23] which held a stepparent unaccountable, stood in conflict with section 5127.5 until 1979. In that year, the "No Duty" statute was repealed and replaced by California Civil Code section 5127.6 which provides that "the interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child residing with the child's natural or adoptive parent who is married to such spouse."[24] The 1979 legislation leaves no doubt regarding the duty imposed upon a stepparent to provide for any child who resides with the stepparent.

In *Brown*, however, the 1979 provisions could not be applied because the children were not living with Roberta and her new husband Paul. Thus, the court relied on section 5127.5 to find Paul liable, and it is that reliance which gives rise to concern regarding the validity of the court's ruling. This concern involves the court's required reconciliation of section 5127.5 with California Civil Code section 199 which limits the child support liability of divorced parents to their earnings, the assets acquired from those earnings, and the separate property of each.

Moreover, section 5127.5 was enacted before the major revision of California's community property laws. This section gives the wife control of her community property interest to the extent necessary to support her children; however, it was enacted when the husband controlled community property and was not amended to reflect the new laws giving equal management and control to the wife. Thus, it may be inferred that the statute was intended to deal with a situation existing only when the husband had control of community property and that the wife's acquisition of equal management rights repealed the section by implication.[25]

If the statute succumbs to these stated objections,[26] sec-

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23. The "No Duty" statute, CAL. CIV. CODE § 209 (West 1979), provided that a stepparent is not obligated to support the children of his or her spouse's former relationships.

24. CAL. CIV. CODE § 5127.6 (West Supp. 1980).

25. *See generally* 2 CAL. FAM. L. PRAC. & PROC. § 2319 (2); *see also* CAL. CIV. CODE § 5125 (West Supp. 1980), which gives the right of equal management and control of community property to the wife.

26. The court's reliance on section 5127.5 also involves the possible unconstitutionality of a statute which refers exclusively to the support of a woman's children

tion 199, which was rejected in *Brown*, remains the only alternative legislation applicable in cases where the child does not live with the stepparent who is to be charged with a support obligation. It must be noted, however, that section 199 has been declared unconstitutional by the Attorney General[27] on the ground that it discriminates against the children of married parents[28] and may thus not answer the liability question.

It has been proposed that, because of the severe objections to section 5127.5, and the probable unconstitutionality of section 199, future courts may be required to apply general community property principles to determine the liability of a stepparent in a case such as *Brown*.[29] Under community property principles, all community property except the earnings of the non-debtor spouse will be liable for the pre-marital debts, and all community property, including the earnings of the non-debtor spouse, will be liable for post-marital debts.[30] There are no cases construing child support as either a premarital or a post-marital debt and a persuasive argument may be made for either position.[31]

Concluding that a stepfather's earnings may be subject to the support of his wife's children by a former marriage, the *Brown* court then considered whether the new husband's income tax returns may be subpoenaed in order to determine the extent of that liability.

The California Supreme Court in *Sav-On Drugs, Inc. v. Superior Court*[32] established the general rule of privilege in discovery of tax returns. The court indicated, however, that there might be circumstances under which discovery of tax re-

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while making no provision for a man's children. If the section is struck down on equal protection grounds, the decision in *Brown* has no foundation and thus, no validity.

27. 59 Op. Cal. Att'y. Gen. 15 (1976).

28. *See* 2 CAL. FAM. L. PRAC. & PROC. § 23.19 (2) which notes that § 199 had been held to be unconstitutional by the Attorney General who found that the children of married parents and unmarried parents are treated differently under the section. He found that it discriminated against the children of married parents who cannot obtain support from the community earnings of their parent's second spouse, while the children of parents who have never married are not governed by the section and therefore can obtain support from such community earnings.

29. *Id.*

30. *See* CAL. CIV. CODE §§ 5120 and 5116 (West Supp. 1980).

31. It might be argued that child support is an obligation which arose before marriage and is therefore premarital. As the duty of support is a continuing one, however, a persuasive argument can also be made in support of the position that it is a post-marital debt, at least as to payments which are to be made after the marriage. 2 CAL. FAM. L. PRAC. & PROC. § 23.19 (2).

32. 15 Cal. 3d 1, 123 Cal. Rptr. 283 (1975).

turns would be permissible,[33] thus laying the foundation for exceptions to the judicially created privilege. The courts presently recognize a single exception to this rule, created in *Miller v. Superior Court.*[34] In *Miller* the court determined that in child support cases, public policy favors disclosure of tax records. Clearly, the *Miller* court had a legislative enactment, Revenue and Taxation Code section 19286.5,[35] leading it to this conclusion.[36] This section allows the Director of Social Services to inspect the income tax records of the responsible relative(s) of any applicant or recipient of social services in order to verify eligibility. *Miller* concluded that the same policy considerations apply to child support enforcement proceedings between private parties "in order that the children who stand to benefit thereby may not become public charges."[37] *Brown* found this limitation to be of importance, but refused to extend its application to the case where there is not yet an existing order for child support. The court concluded that the difference is "more than one of form, in the context of policy to be followed."[38] Since the court does not explain these policy distinctions, some difficulty may exist in accepting its failure to apply the considerations articulated in *Miller.* The difficulty becomes especially acute when a child depends entirely upon the stepparent for support.

Brown further indicated that the public interest in preserving the marital relationship "as enunciated in the spousal privilege" does bar disclosure of the present husband's tax returns.[39] The court placed great emphasis on the fact that the Miller's marriage had terminated while that of Roberta and Paul is intact. This distinction between proceedings involving divorced spouses as opposed to proceedings involving a mar-

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33. *Id.* at 8, 123 Cal. Rptr. at 287.

34. 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521, 523 (1977).

35. CAL. REV. & TAX. CODE § 19286.5 (West Supp. Pamphlet 1980).

36. Although *Brown* specifically states that § 19286.5 is not applicable to the case, the section is relevant insofar as it lays the foundation for the *Miller* decision which *Brown* has relied upon. This section provides that the Director of Social Services may inspect income tax records belonging to applicants or recipients of assistance *and their responsible relatives* in order to verify or determine the eligibility or entitlement of an applicant. (Emphasis added). *See also In re* Marriage of Sammut, 103 Cal. App. 3d 557, 562, 163 Cal. Rptr. 193, 196 (1980), which states that "[i]t is clear that the *Miller* court had a legislative enactment directing its path to a conclusion that in child support cases public policy favors disclosure of income tax records."

37. 71 Cal. App. 3d at 149, 139 Cal. Rptr. at 523.

38. 99 Cal. App. 3d at 709, 160 Cal. Rptr. at 527.

39. *Id.*

riage still intact was recently found "unpersuasive," however, "as the same result can occur in a *Miller* type case."[40]

The stronger argument for the *Brown* decision is in its recognition of the fundamental difference between an existing duty to support a child and the mere apportioning of such duty. It is obviously important to assure that a child receive the support he or she needs and in most instances the impact upon the child's welfare is immediate. The same concerns are not always relevant where the liability is merely to be apportioned. It is left to the courts to determine the applicability of "judicially created" rules.[41] *Brown* reflects a sound balancing of these considerations by determining that the privileged nature of tax information outweighs the interest in apportioning support obligations when the child's welfare is not immediately at issue. Yet, as the *Brown* decision is based primarily upon a balancing of policy considerations, each subsequent decision will require a new balancing in light of new facts. To that extent, application of the stated rule may be difficult.

In conclusion, the court's holding—that all the property of the mother, including her community interest in the income of her new spouse, may be looked to in discharge of her child support obligation, but that the tax records of her new spouse are not discoverable—is not as determinative as it first appears. A more conclusive answer would entail a direct legislative determination regarding the rights of a minor child in the community property and earnings of a parent and stepparent with whom the child does not reside, and it is left to future decisions to define the full ambit of the tax privilege in the context of child support proceedings.

Susan Atchison

40. *In re* Marriage of Sammut, 103 Cal. App. 3d at 562, 163 Cal. Rptr. at 196.

41. Wilson v. Superior Court of Sacramento County, 63 Cal. App. 3d 825, 829, 134 Cal. Rptr. 130, 133 (1976).

DAMAGES—A JURY SHOULD RECEIVE EVIDENCE AND INSTRUCTIONS CONCERNING THE IMPACT OF FEDERAL INCOME TAXATION ON AN AWARD OF DAMAGES—*Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980).

In most cases[1] that arose under the Federal Employer's Liability Act (FELA)[2] prior to *Norfolk and Western Railway Co. v. Liepelt*,[3] trial judges refused to instruct the jury concerning the impact of federal income taxes on the amount of damages to be awarded. The United States Supreme Court addressed the issue for the first time in *Norfolk* because, according to Justice Stevens, "the prevailing practice developed at a time when federal taxes were relatively insignificant, and because some courts are now following a different practice."[4]

In *Norfolk*, the decedent, a freight train fireman, was killed when a locomotive collided with a loaded hopper car on a siding track.[5] The administrator of the decedent's estate brought a wrongful death action under the FELA in state court to recover damages from the railroad. After the circuit court in Cook County, Illinois, entered judgment for the administrator and awarded damages of $775,000,[6] the railroad appealed.[7] The judgment was affirmed by the First District Appellate Court of Illinois,[8] and a subsequent appeal to the

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1. *See* Raines v. New York Cent. R.R. Co., 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972); Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

2. 45 U.S.C. § 51 (1908).

3. 444 U.S. 490 (1980), *rehearing denied*, 445 U.S. 972 (1980).

4. *Id.* at 491.

5. The trial court held that the railroad was negligent, and the negligence issue was not brought before the Court. *Id.* at 491 n.2.

6. *Id.* at 491.

7. 62 Ill. App. 3d 653, 378 N.E.2d 1232 (1978).

8. The court held that it was "not error to refuse to instruct a jury as to the nontaxability of an award" and that it was "not error to exclude evidence of the effect of income taxes on future earnings of the decedent." 62 Ill. App. 3d 653, 668-69, 378 N.E.2d 1232, 1245 (1978).

The Appellate Court of Illinois recognized that the practice then being followed in Illinois could be subject to change when the United States Supreme Court addressed the issue. However, since the United States Supreme Court was silent on the issue, the Appellate Court of Illinois decided to follow the decisions of the Illinois Supreme Court in Raines v. New York Cent. R.R. Co., 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972), and in Hall v. Chicago and N.W. Ry. Co., 5

Illinois Supreme Court was denied.[9] The United States Supreme Court granted certiorari, and held that (1) evidence of the income taxes payable on the decedent's past and estimated future earnings was admissible, and (2) the trial court should have instructed the jury that the damages awarded would not be subject to income taxation.[10]

The administrator's (the respondent's) economic expert had estimated that the net pecuniary loss to the decedent's family would amount to $302,000.[11] The expert arrived at this figure by first estimating that the decedent's earnings would have increased approximately five percent per year, which would amount to $51,600 in the year 2000, the year of the decedent's expected retirement.[12] The expert then added the gross amount of those earnings to the value of the services the decedent would have performed for his family, and subtracted the amount the decedent would have spent upon himself.[13] The total sum amounted to $302,000, when discounted to present value at the time of trial.[14]

Petitioner railroad objected to the use of gross earnings, without any deduction for income taxes. Through its own expert, petitioner offered to prove that the decedent's federal income taxes from 1973 to the year 2000 would have amounted to $57,000.[15] Taking that figure into account, and making different assumptions about the rate of future increases in salary and the calculation of the present value of

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Ill. 2d 135, 125 N.E.2d 77 (1955).

In *Raines*, the Illinois Supreme Court held that in an action under the FELA it was immaterial that the award to the plaintiff would not be subject to income tax and that it was not error to refuse to instruct the jury as to the taxability of the award. The court cited *Hall:*

> Whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tortfeasor has no interest in such question. And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified.

Id. at 151-52, 125 N.E.2d at 86.

9. 444 U.S. at 491 n.3.

10. *Id.* at 491.

11. *Id.* at 492. The measure of damages in a wrongful death action under the FELA is the loss of the pecuniary benefits which the decedent's family would have received. *Id.* at 493.

12. *Id.* at 492.

13. *Id.*

14. *Id.*

15. *Id.*

future earnings, the expert estimated $138,327 as the net pecuniary loss.[16] The jury, however, returned a verdict of $775,000.[17]

Both petitioner and respondent offered arguments to explain the jury's award of a larger sum than either side had calculated. Petitioner argued that the jury must have believed that the award was subject to federal income taxation, and that the petitioner was prejudiced by the trial judge's refusal to instruct the jury that the award would not be subject to income taxation.[18] Respondent argued that the jury must have considered the pecuniary value of the guidance the decedent would have provided to his children.[19]

The two issues addressed by the Court were (1) whether the jury should be instructed as to the taxability of the damages awarded, and (2) whether evidence of the impact of income taxation on future earnings should be admissible. Justice Stevens asserted that the two issues were governed by federal law[20] since the measure of damages in a FELA action is federal in character, even if the action is brought in state court.[21]

Addressing the issue of whether evidence of income taxation should be admitted, respondent offered a "Pandora's Box" argument: if this door is opened, other equally relevant evidence must also be admitted. Respondent claimed that "in discounting the estimate of future earnings to its present value, the tax on the income to be earned by the damages award is now omitted."[22] In response, the Court admitted that

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 492 n.4.
20. *Id.* at 492-93.
21. *Id.* at 493.
22. *Id.* at 495. "[T]he product of plaintiff's lost earning power ex-tax and his expectancy will have been discounted to produce 'that sum of money which if invested at a fair rate of return will yield annually the amount by which the plaintiff's earning capacity has been lessened and which will at time of end of the plaintiff's life expectancy be reduced to zero. This takes into account the fact that money earns interest each year; and it should be remembered that *this interest is taxable.* Therefore, if a court is going to use income after taxes as a measure of plaintiff's loss, it must add back the taxes which would be due on the interest earned—else the award would not fully compensate for the loss.'"

McWeeney v. New York, N.H. & H.R.R. Co., 282 F.2d 34, 37 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960), citing Morris and Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A. J. 274, 328 (1960). *See also* Nord-

present value, like future earnings, should probably be estimated on an after-tax basis.[23] However, the Court was not persuaded that merely because such an after-tax estimate would also be admissible, gross earnings should be used instead of net earnings to determine the pecuniary loss to the decedent's family.[24]

Expanding on the "Pandora's Box" argument, respondent argued that her attorney's fees and litigation costs were an equally relevant factor in determining compensation.[25] The Court rejected this argument by claiming it was contrary to the "American Rule."[26] In addition, the Court explained that unlike a number of other federal statutes,[27] the FELA does not allow recovery of attorney's fees. The Court firmly disposed of the argument by asserting that a relevant factor, such as income tax, should not be ignored "in order to offset what may be perceived as an undesirable or unfair rule regarding attorney's fees."[28]

The Court held that evidence of the amount of income tax payable on past and estimated future earnings should not be excluded. First, the Court noted that "[i]n a wrongful-death action under the FELA, the measure of recovery is 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. . . .' "[29] The Court asserted that income tax is a relevant factor in determining pecuniary loss because net income is the only realistic measure of the decedent's ability to support his family.[30]

Second, the Court rejected the argument that evidence of income taxation on future earnings is too speculative and complex for jury deliberation.[31] Justice Stevens stated that

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strom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 227-28 (1958). (Emphasis in original).

23. 444 U.S. at 495.

24. *Id.*

25. *Id.*

26. *Id.* at 495. The traditional "American Rule," according to BLACK'S LAW DICTIONARY 75 (5th ed. 1979), is that attorney's fees are not awardable to the winning party unless statutorily or contractually authorized.

27. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e(5)(k)(1976); Clayton Act, 15 U.S.C. § 15 (1976).

28. 444 U.S. at 495-96.

29. *Id.* at 493 (citing Michigan Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 70 (1913)).

30. 444 U.S. at 493.

31. *Id.* at 494. "This is not to say, however, that introduction of such evidence

because juries are increasingly familiar with modern life complexities, the evidence will be understood if presented simply and effectively.[32]

The Court also held that it was error for the trial judge to refuse to instruct the jury that the damages awarded would not be subject to income taxation.[33] Justice Stevens asserted that the jury may not realize that wrongful death awards are not subject to taxation. Furthermore, " 'giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.' "[34] The Court stated that the instruction could be made brief, comprehensible, and nonprejudicial to either party. Thus, it would not complicate the trial, but merely eliminate speculation by the jury. Explaining that the award is nontaxable, and that no additions or subtractions should be made for income tax purposes, should aid the jury in awarding damages.[35]

Norfolk marks a new approach by the United States Supreme Court. By previously remaining silent on the issue, the Court appeared to condone the practices of the lower courts. The Court has now asserted that the jury should receive evidence and instructions on the impact of federal income taxation on an award of damages.

Although the Court avoided the issue of whether the ruling would result in a windfall to the tortfeasor, it did not avoid the issue of whether Congress intended to confer a tax benefit on the plaintiff[36] through section 104(a)(2) of the Internal Revenue Code.[37] The dissent claimed that Congress in-

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must be permitted in every case. If the impact of future income tax in calculating the award would be *de minimis*, introduction of the evidence may cause more confusion than it is worth." *Id.* at 494-95 n.7.

32. *Id.* at 494.

33. *Id.* at 498.

34. *Id.* (citing Burlington Northern, Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975)).

35. Comment, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 279 (1966).

36. 444 U.S. at 496 n.10.

37. The section provides in relevant part:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
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> . . .
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> (2) the amount of any damages received (whether by suit or agree-

tended section 104(a)(2) to confer a benefit on the victim or his survivors, and that the Court's ruling tends to appropriate that benefit to the tortfeasor.[38]

The majority, on the other hand, did not believe that Congress intended section 104(a)(2) to benefit the survivors. The Court found nothing in the language or legislative history of section 104(a)(2) to suggest that the section has an impact on the measure of damages in a wrongful death action. The Court stated that "netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more than netting out the decedent's personal expenditures."[39]

The Court seems to strain in this portion of the decision. Both deductions achieve the same result, a lower award. But it is unrealistic to assume that making deductions, which in turn lower the damages awarded, would not benefit the tortfeasor, who would then pay less money.

Overall, the decision is a good one. As the Court points out, giving the jury the instruction will do no harm. The instruction may help prevent large awards, which may result from a misconception regarding taxation. Large awards increase insurance costs as well as other costs and the public eventually bears the burden of these increased costs.

Using future net earnings is more accurate than using future gross earnings to arrive at a figure which closely represents the plaintiff's loss. The decedent would have had to pay income taxes on his earnings if he had been alive. The legal system's goal is to compensate the plaintiff for his losses, not to overcompensate him.

Norfolk could have a tremendous impact on jury instructions. Older cases illustrate that not much intelligence was attributed to members of the jury.[40] However, jurors are becoming more intelligent, as larger numbers of persons finish high school, and attend college and graduate school.[41] As courts

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ment) on account of personal injuries or sickness;

"The section is construed to apply to wrongful-death awards; they are not taxable income to the recipient." *Id.* at 496.

38. *Id.* at 498-99 (dissenting opinion).

39. *Id.* at 496 n.10.

40. Income taxes have not been taken into consideration in past cases primarily because it was believed the jury would be confused. *Id.* at 494.

41. The total enrollment of persons in institutions of higher education increased from 5.9 million in 1965 to 11.2 million in 1975 and is expected to be 13.4 million in 1985. *Statistics of Higher Education* 1977-78 Y. B. OF HIGHER EDUCATION 584

recognize that jurors are attaining a greater degree of sophistication, jury instructions will become more complex. More complex instructions will give the jury the opportunity to weigh the issues in a superior light, and perform its judicial duties more efficiently. There is no valid reason why a jury should be left to speculate. An informed jury is a better jury.[42]

Norfolk cannot help but clarify any questions the jurors may have concerning federal income taxation. Using net income figures instead of gross income figures results in an award that is fair to both parties. The defendant would be prejudiced if the jury awarded a larger sum to the plaintiff because the jury mistakenly believed that the plaintiff would have to pay federal income taxes on the award. Our system of justice cannot permit a plaintiff to recover a larger award than he is entitled to receive. Fairness is the basis of our legal system, and defendants as well as plaintiffs deserve to be treated fairly. The Court's ruling in this case will ensure that this is accomplished.

Lynette Inga

(Marquis Academic Media).

42. Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved in determining the amount of damages in personal injury or wrongful death actions are not capable of exact proof in terms of dollars and cents; hence, the only standard is such an amount as a reasonable person would estimate as fair compensation. Roedder v. Rowley, 28 Cal. 2d 820, 823, 172 P.2d 353, 354 (1946). In *Norfolk*, the jury may have considered factors such as the care and guidance that the decedent would have provided to his children.